

degenerative disc disease. Appellant returned to modified-duty work until retirement in February 1991. He then began receiving total disability compensation from the Office. In an August 25, 1999 decision, the Office determined that appellant's reemployment as a turret guard at Brinks Security effective January 1, 1993 fairly and reasonably represented his wage-earning capacity and reduced appellant's compensation accordingly. As a result, appellant received partial wage-loss compensation from the Office.

By decision dated April 22, 2009, the Office terminated appellant's compensation benefits and modified his August 25, 1999 loss of wage-earning capacity decision to zero effective April 22, 2009. It determined that the medical evidence established that he no longer had any residuals or disability on account of the accepted injury.

On September 10, 2009 appellant's attorney requested a telephonic hearing. He indicated that appellant had "previously filed the appeal."

By decision dated October 26, 2009, the Office's Branch of Hearings and Review denied appellant's request for a telephonic hearing on the grounds that it was untimely. It exercised its discretion and further denied his request on the basis that the issue in the case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that he was entitled to compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

"Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹

The claimant can choose between two formats: an oral hearing or a review of the written record.² The requirements are the same for either choice.³ The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.⁴ However, when the request is not timely filed or when reconsideration has previously been requested, the

¹ 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

² 20 C.F.R. § 10.615.

³ *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

⁴ 20 C.F.R. § 10.616(a); *see Martha A. McConnell*, 50 ECAB 129, 130 (1998).

Office may, within its discretion, grant a hearing or review of the written record and must exercise this discretion.⁵

ANALYSIS

By decision dated April 22, 2009, the Office terminated appellant's compensation benefits and modified his loss of wage-earning capacity dated August 25, 1999 to zero effective April 22, 2009. Appellant's request for a hearing before an Office hearing representative was dated September 10, 2009, more than 30 days after the April 22, 2009 decision. Therefore, his request was not timely and appellant was not entitled to an oral hearing as a matter of right.⁶ Although appellant's attorney indicated that appellant previously filed an appeal, the record does not indicate that he requested a hearing within 30 days of the April 22, 2009 decision or that he exercised any other appeal right regarding that decision.

The Office has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of rights. In its October 26, 2009 decision, the Office properly exercised its discretion. It considered the issue involved and had denied appellant's request for an oral hearing on the basis that his claim on the issue of whether he was entitled to compensation benefits could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that the only limitation on the Office's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.⁷ In the present case, the Office did not abuse its discretion in denying a discretionary hearing.⁸

CONCLUSION

The Board finds that the Office properly found that appellant had filed an untimely request for an oral hearing.

⁵ See *R.T.*, 60 ECAB ____ (Docket No. 08-408, issued December 16, 2008); 20 C.F.R. § 10.616(b).

⁶ 20 C.F.R. § 10.616(a).

⁷ *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁸ Appellant submitted new medical evidence subsequent to the Office's April 22, 2009 decision and before the Board. The Board has no jurisdiction to review new evidence on appeal. See 20 C.F.R. § 501.2(c). Appellant can resubmit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated October 26, 2009 is affirmed.

Issued: September 8, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board